Supreme Court, U.S.
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90-1254

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

-vs-

EDDY GUZMAN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I Whether, the New York State Court of Appeals, in allowing the New York State Supreme Court, Fourth Department, Appellate Division decision and opinion to stand, has failed to recognize the United States Supreme Court decisions and "drug currier profile" cases?

II Whether, the instant decision and opinion improperly decided a Federal question regarding unreasonable searches and seizures within the purview of the Fourth Amendment to the United States Constitution?

III Whether, the instant decision and opinion improperly expands the *Miranda* decision at a time in history when the majority of this Court seems to have rejected its doctrinal basis?

IV Whether, defendant Guzman was not in custodial detention nor subject to custodial interrogation at the time he consented to a search of his vehicle?

V Whether, under *Miranda* and its progeny there is no authority for the police officer to be required to provide right to counsel and right of refusal notices?

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II. The instant decision and opinion improperly decided a Federal question regarding unreasonable searches and seizures within the purview of the Fourth Amendment to the United States Constitution.

III. The instant decision and opinion improperly expands the *Miranda* decision at a time in history when the majority of this Court seems to have rejected it doctrinal basis.

IV. Defendant Guzman was not in custodial detention nor subject to custodial interrogation at the time he consented to a search of his vehicle.

V. Under *Miranda* and its progeny there is no authority for the police officer to be required to provide right to counsel and right of refusal notices.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioners

—*vs* —

EDDY GUZMAN,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

The Petitioner, The People of the State of New York, prays that a Writ of Certiorari issue to review the final Order and Judgment of the Court of Appeals of the State of New York dismissing Petitioner's appeal on the opinions below.

OPINIONS BELOW

The Memorandum Opinion of the Appellate Division of the Supreme Court, State of New York, Fourth Department, dated February 2, 1990, is at present unreported and appears as #1 of Petitioner's appendix. The certificate of the Supreme Court of the State of New York, Appellate Division, Fourth Judicial Department, granting permission to appeal to the New York State Court of Appeals dated March 22, 1990, is annexed and appears as #2 of Petitioner's appendix.

The Order and Judgment of the New York State Court of Appeals dismissing Petitioner's appeal dated July 5, 1990, and received July 9, 1990, is annexed and appears as #3 of Petitioner's appendix.

JURISDICTION

The final Order of the Court of Appeals of the State of New York dismissing Petitioner's appeal is dated July 5, 1990, and received July 9, 1990. This Petition for a Writ of Certiorari is filed timely within 90 days thereof. The jurisdiction of this Honorable Court rests upon 28 U.S.C. Section 1254, and Rule 10 of this Court.

CONSTITUTIONAL AND FEDERAL PROVISIONS INVOLVED

"The right of the People to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause..." [Fourth Amendment].

"No person shall be deprived of life, liberty, or property, without due process of law..."[Fifth Amendment].

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without

due process of law..." [Section 1, Fourteenth Amendment].

The United States Supreme Court "Drug Currier Profiles" line of cases including US v. Saccolo, US decided April 3, 1989.

The rule of "consent searches" contained in Florida v. Rodriguez 469 US 1 (1984).

STATEMENT OF THE CASE

On June 22, 1988, Defendant/Appellant **Eddy Guzman** was operating a motor vehicle on the New York State Thruway in Cayuga County. Present within the vehicle were Jose Guzman, Defendant's cousin, and Luis Rodriguez.

New York State Police Officer Jerome T. Crawford clocked the vehicle at approximately 8:15 AM traveling 66 mph in a 55 mph zone. Trooper Crawford pulled over the subject vehicle and Defendant failed to produce a valid registration for the vehicle. Defendant was requested to accompany the Trooper to the police vehicle where Trooper Crawford radioed for a check on the license and registration.

While sitting in the Trooper car, Trooper Crawford noticed co-defendant Rodriguez who was sitting in the back seat of the subject vehicle lean forward and out of sight, making "some furtive movements which raised my suspicion." (R.20). ("R" refers to record on appeal.

The Trooper asked the subject whether he was carrying any type of contraband, to which the subject replied in the negative. The Trooper inquired as to whether or not he could search the vehicle and the subject Defendant consented thereto.

Trooper Crawford noticed the rear seat in the area where subject Rodriguez was making furtive movements which raised the Troopers' awareness and suspicion to be ajar, and upon lifting the seat, observed a brick-shaped form wrapped in paper which he

picked up, tore away the paper, and observed a white powdery substance which ultimately tested to be approximately 249 grams of cocaine, a narcotic drug.

The three subjects were arrested for possession of a controlled substance, were given proper Miranda warnings, were booked and processed, and each separately gave a sworn Affidavit as to the events leading up to this arrest, each being inconsistent with the others.

Motions were heard and Suppression and Huntley (People v. Huntley, 15 NY2d 72) hearings were held on January 30, 1989, from which County Court Judge Honorable Peter E. Corning issued a decision dated March 23, 1989. It is from said hearing and decision that Defendant/Appellant instituted an appeal to the New York State Supreme Court, Appellate Division, Fourth Judicial Department.

Incidentally, Defendant/Appellant plead guilty to the reduced charge of **Criminal Possession of a Controlled Substance in the Second Degree**, a Class A-II felony, in violation of Section 220.18 of the New York State Penal Law, having been duly indicted by a Cayuga County Grand Jury for Criminal Possession of a Controlled Substance in the First Degree, a Class A-I felony on April 7, 1989. Defendant was sentenced on June 2, 1989, to an indeterminate term of three years to life imprisonment.

The Fourth Department Appellate Division reversed on the law and facts and dismissed the Indictment. Associate Justice Elizabeth W. Pine granted leave to appeal to the New York State Court of Appeals.

The New York State Court of Appeals Ordered and Adjudged that the appeal be dismissed upon the ground that the reversal by the Appellate Division was not "on the law alone or upon the law and such facts which, but for the determination of law, would not have led to reversal." [CPL Section 450.90 (2)(a), pursuant to Section 500.4 of the Rules of the Court of Appeals, a copy of which is annexed hereto as No. 4].

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

Review by certiorari is appropriate in the case at bar under Rule 10, subparagraphs l(b), and l(c), specifically that a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals, and has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

The Supreme Court, Appellate Division, Fourth Department opinion and decision ("upheld," in effect, by the New York State Court of Appeals by dismissing appellant's appeal) fails to recognize the "drug currier profile" line of cases decided by the United States Supreme Court. Further, said decision directly conflicts with and impermissibly limits the guarantees and protections of the United States Constitution's Fourth Amendment and the United States Supreme Court decisions interpreting same in this regard. This decision amounts to an improper expansion of the Miranda decision in an era when the current majority of the Supreme Court has rejected its doctrinal basis. Finally, the instant decision conflicts directly with Supreme Court case law regarding search incident to arrest and consent search issues.

ARGUMENT
I

THE NEW YORK STATE COURT OF APPEALS, IN ALLOWING THE NEW YORK STATE SUPREME COURT, FOURTH DEPARTMENT APPELLATE DIVISION DECISION AND OPINION TO STAND, HAS FAILED TO RECOGNIZE THE UNITED STATES SUPREME COURT DECISIONS AND "DRUG CURRIER PROFILE" CASES.

The United States Supreme Court has consistently held, regarding "drug currier profiles", that even where each individual factor considered by a police officer can be interpreted innocently, when said factors added up constitute articulable suspicion, a Terry

v. Ohio stop is justified, which under certain circumstances may warrant restraint, search, and seizure. US v. Saccolo, US decided April 3, 1989; see also US v. Mendenhall, 446 US 544 (1980). Reid v. Georgia, 488 US 438 (1980). US V. Place, 462 US 696 (1983), Florida v. Rover, 460 US 491 (1983), and Florida v. Rodriguez, 469 US 1 (1984).

In a Terry-type restraint, a person expects to be embarrassed (e.g. being handed a traffic citation) and held for a short period of time. As the scope of such a confrontation is brief and does not cut off the citizen from the outside world, and there is no compulsion within the context and meaning of Miranda. Pennsylvania v. Bruder, US , decided October 31, 1988.

The facts and circumstances that presented themselves to Trooper Crawford on the date and time in question, when considered chronologically as they developed, certainly rose to the level of articulable suspicion justifying the request to search which resulted in the consent and subsequent seizure of illegal contraband.

As such, Judge Green's opinion that defendant's conduct did nothing to arouse the Officer's suspicion is incorrect on the law. That the facts are basically not in dispute as Trooper Crawford was the sole witness who testified at the hearing.

Judge Green's opinion concluding defendant not to have voluntarily consented is incorrect on the law and that the Suppression Court's finding that defendant voluntarily consented to the search of his car should have been affirmed. People v. Gonzalez, 39 NY 2d 122; Florida v. Rodriguez, supra.

II

THE INSTANT DECISION AND OPINION IMPROPERLY DECIDED A FEDERAL QUESTION REGARDING UNREASONABLE SEARCHES AND SEIZURES WITHIN THE PURVIEW OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION

Albeit begrudgingly, Respondent conceded that Trooper Crawford had authority to stop defendant originally for speeding.

There can be no dispute in this instance that Trooper Crawford had the authority to stop the defendant for speeding. People v. Ingle, 36 NY 2d 413 (1975). Additionally, the arresting officer had the authority to direct the driver to step out of the vehicle and make reasonable inquiries. Pennsylvania v. Mimms, 434 US 106.

It has been held that a full scale search of a driver conducted pursuant to a custodial arrest for a traffic offense is Constitutionally permissible. People v. Troiano, 35 NY 2d 476 (1974).

While defendant's counsel attributed "exciting" investigative activity to Trooper Crawford's follow-up actions, the facts demonstrate that co-defendant Rodriguez, one of the occupants remaining in the vehicle while Trooper Crawford was executing standard operating procedures to check out license and registration information, engaged in suspicious activity. As such, the totality of the circumstances which presented themselves to the arresting officer created reasonable cause to believe that criminal activity was afoot and that contraband may be being transported within the vehicle. This Court, due to the valid consent, does not have to reach the issue of whether or not the officer had probable cause sufficient to justify the search of the car pursuant to People v. Chestnut, 36 NY 2d 771 (1975), People v. John B.B. and Steven C.C., 56 NY 2d 482 (1982), People v. LaBelle, 37 AD 2d 135 (3rd Dept. 1971), and People v. McLaughlin, 48 AD 2d 722 (3rd Dept. 1975). People v. Sobotakar, 43 NY 2d 559 (1978), stands for the proposition that when an officer possesses a reasonable suspicion of criminal activity based on "specific and articulable facts which, taken together with rational inferences from those facts," an intrusion is reasonably warranted.

The automobile exception to the requirement of a search warrant permits an area search of the entire interior passenger compartment, the trunk and the glove compartment pursuant to New York law regarding permissible scope of search. Further the police may search any container located in a car. If the driver or occupant is arrested, police may search (for a reasonable time and a reasonable extent) the car and any closed container visible in the passenger compartment when there is a reasonable belief that the contents of the car are related to the crime for which the arrest is made, or that it contains a weapon or means of escape. New York

v. Belton, 50 NY 2d 447 (1980), reversed 101 Supreme Court 2860 (1981), affirmed on other grounds, 55 NY 2d 49 (1982).

In People v. Langen, 60 NY 2d 170 (1983), the Court held that the scope of the search is not defined by the nature of the container but by the object of the search and the places in which there is probable cause to believe that it may be found. See also People v. Ellis, 62 NY 2d 393 (1984).

It is well established law in New York State and clear that a search incident to lawful arrest may encompass the entire passenger compartment of a car plus any "containers" found therein. New York v. Belton, supra., People v. Smith, 59 NY 2d 454 (1983). People v. Gokey, 60 NY 2d 309 (1983).

People v. Marsh, 20 NY 2d 98 (1967) stands for the proposition that a search of a vehicle may not be conducted as incident to a vehicle and traffic law arrest unless there are present additional factors amounting to probable cause to search the vehicle. In the case at bar, such additional factors presented themselves to the arresting officer by way of the "furtive" movements of one of the occupants thereof.

Respondent Guzman was properly being asked routine roadside investigatory questions by Trooper Crawford, and was neither in custody nor entitled to Miranda warnings necessitated by a full custodial interrogation. Berkemer v. Mc Carty, 468 US 420 (1984). These Trooper's questions were preliminary and not violative of respondent's rights. People v. Lynq, 104 AD 699 (3rd Dept. 1984); see also People v. Tomassi, 112 AD 2d 932 (2nd Dept., 1985).

III

THE INSTANT DECISION AND OPINION IMPROPERLY EXPANDS THE MIRANDA DECISION AT A TIME INHISTORY WHEN THE MAJORITY OF THIS COURT SEEMS TO HAVE REJECTED ITS DOCTRINAL BASIS.

Honorable Samuel L. Green, in the Supreme Court, Appellate Division majority opinion, concluded as a matter of law that the

New York State Trooper who testified at the Suppression Hearing lacked justification to question defendant about matters unrelated to the speeding violation or for searching the vehicle by looking underneath the seats. The majority found that, on the record, consent to "look" in the car did not amount to consent to "search" it by removing the rear seat, and further found that any consent was involuntary.

To the contrary, as is set forth in Honorable Elizabeth W. Pine's dissenting opinion, on cross-examination, the Officer was asked, without objection, "After you asked Mr. Guzman if he would mind permitting you to search his vehicle, you testified that he had said yes, that it would okay?" The Officer responded, "That's right."

Petitioner respectfully submits that the proper issue to be determined by the Suppression Court was whether or not defendant knowingly, voluntarily, and intelligently consented to the search of the vehicle pursuant to the criteria of People v. Gonzalez, 39 NY 2d 122. The record clearly supports the Suppression Court's findings in this regard as a matter of law.

Trooper Crawford noticed "furtive" movement from the back seat passenger, raising his level of suspicion and justifying further inquiry and a request of defendant for a consent search of the vehicle. The Trooper saw the rear seat to be very loose when he reapproached the subject vehicle where the furtive movement had taken place.

Additional facts as testified to by the New York State Trooper were that defendant's vehicle purported to be a Buffalo Taxi Cab for which a proper registration was unable to be produced. Defendant stated that he and his two passengers (all three of whom were Hispanic males) were coming from New Jersey in this purported Taxi Cab traveling on the New York State Thruway in the Town of Brutus, New York, some 150 miles from Buffalo, New York; driving on an expressway connecting Buffalo to the New York City area, a roadway well known by law enforcement to be used by drug curriers.

The Court and the New York State Trooper correctly interpreted permission to look in the defendant's car as permission to search; there is no magic under statutory or case law to the use or not of the word "search".

IV

DEFENDANT GUZMAN WAS NOT IN CUSTODIAL DETENTION NOR SUBJECT TO CUSTODIAL INNTERROGATION AT THE TIME HE CONSENTED TO A SEARCH OF HIS VEHICLE

The People respectfully submit to this Court that in view of all of the circumstances surrounding the instant incident, it must be concluded that defendant was not subjected to custodial detention and/or a custodial interrogation at the time he granted Trooper Crawford permission to look into his car. Having acted properly up to and including the moment of said question, and having his level of suspicion raised due to the aforementioned furtive movements of passenger and co-defendant Rodriguez, Trooper Crawford properly inquired further and obtained knowing and voluntary consent to search the subject vehicle from defendant Eddy Guzman. To hold otherwise would be to substantially expand the application and requirements dictated under Miranda and the protection afforded by the Fourth Amendment to the United States Constitution.

V

UNDER MIRANDA AND ITS PROGENY THERE IS NO AUTHORITY FOR THE POLICE OFFICER TO BE REQUIRED TO PROVIDE RIGHT TO COUNSEL AND RIGHT OF REFUSAL NOTICES

Contrary to the position taken by the Supreme Court, Appellate Division, Fourth Department, and consequently the New York State Court of Appeals, which would significantly expand Miranda and the protections afforded United States citizens under the Fourth and Fifth Amendments, both New York State and Federal Court decisions have been limiting and eroding the Miranda rule as applies to the situations such as the case at bar.

To fully and fairly consider and analyze this issue, a fourpronged analysis is needed. To begin with, we must ask the question whether or not Defendant's statement was the unattenuated product of an unreasonable entry, search, detention, or arrest pursuant to Fourth Amendment. Clearly the answer is no.

The next question to consider would be whether or not Miranda applies, and if so, was it complied with within the context of compelled self-incrimination and the Fifth Amendment? Again, it becomes obvious that Miranda does not apply.

Considering the Sixth Amendment right to counsel, we would have to ask whether or not the rights attached here. Commencing with Spano v. New York, 360 U.S. 315 (1959), Massiah v. United States, 37 US 201 (1964), and Escobedo v. Illinois, 378 US 478 (1964), and up through the New York Court of Appeals decisions in People v. Donovan, Hobson, Arthur, Settles, and Samuels,* it is well established law in both New York State and Federally that defendant's right to counsel did not attach under these facts and circumstances. The so-called Donovan, Arthur, Hobson rule does not apply when, as here, defendant is not in custody. People v. McKie, 25 NY 2d 19.

Finally, under the Fourteenth Amendment due process clause, we must question the voluntariness of the consent; i.e., whether force, threats, promises of lenience, express or implied "however slight" were instituted. Again, it is clear from the fact pattern presented that there was no police coercion against an impaired suspect.

The United States Supreme Court has consistently held that the extraordinary safeguard of Miranda "does not apply outside the context of the inherently coercive custodial interrogation for which it was designed." Minnesota v. Murphy, 465 US 420, 430, (1984). The actions and questions of Trooper Crawford in the instant case are those normally attendant to such a vehicle and traffic arrest, and do not constitute an interrogation under Miranda. Rhode Island v. v. Innis, 466 US 291, 301 (1980).

In this case, defendant was not taken into custody or otherwise deprived of his freedom of action in any significant way. Beckwith v. United States, 425 US 341, 345 (1976). *see footnote page.

In Berkemer v. McCarty, 468 US 420, 440 (1984), it was held that the comparatively not threatening character of detentions such as pedestrian checks (Terry v. Ohio stops), or routine traffic stops where the detainee is admittedly not free to leave, explains the absence of any suggestion that these stops are subject to the

dictates of Miranda. Persons temporarily detained pursuant to such stops are clearly not "in custody" for the purposes of Miranda. See also Pennsylvania v. Bruder, US (Oct. 1988).

Based upon the foregoing and recent trends, it would appear that rather than expanding the application of Miranda v. Arizona, as appellant would ask this Appellate Court to do, it may well be that Miranda "is a decision without a future.. The current majority of the Supreme Court has rejected the doctrinal basis of Miranda..." THE PROSECUTOR journal of the New York State District Attorney's Association, Fall, 1987, Volume 21, No. 2, Pages 13 - 38.

CONCLUSION

For the foregoing reasons, it is respectfully submitted on Petitioner's behalf that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Appendix

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

2047

PRESENT: BOOMER, J.P., GREEN, PINE, LAWTON, DAVIS,JJ.

PEOPLE OF THE STATE OF NEW YORK,

Respondent

-vs-

EDDIE GUZMAN,

Appellant

The above named Eddie Guzman having appealed to this court from the judgment of the Cayuga County Court, entered in the Cayuga County Clerk's office on June 2, 1989. and said appeal having been argued by Andrew Phelan of counsel for appellant, and submitted by Dennis Sedor of counsel for respondent, and due deliberation having been had thereon.

It is hereby ORDERED, That the judgment so appealed from be and the same hereby is reversed on the law and facts and the indictment is dismissed.

Opinion by Green, J., which is hereby made a part hereof.

All concur, except Boomer and Pine, JJ., who dissent and vote to affirm, in an Opinion by Pine,J.

Entered: February 2, 1990 CARL M. DARNALL, Acting Clerk

2047. (Cayuga Co.) -- PEOPLE OF THE STATE OF NEW YORK, RESPONDENT V EDDIE GUZMAN, APPELLANT -- Judgement reversed on the law and facts and indictment dismissed. Opinion by Green, J.: County Court should have granted defendant's motion to suppress contraband seized under the rear seat of the vehicle he was driving because the police officer's conduct exceeded permissible constitutional bounds and because defendant's conduct did nothing to arouse the officer's suspicion that he was engaged in criminal activity.

Defendant was driving, with permission, a Buffalo Airport taxi containing his cousin and a friend when he was stopped by a state police officer for speeding on the New York State Thruway. The officer asked the defendant for his license and registration. Defendant produced his license and a taxi certificate but could not find the registration. The officer directed defendant out of the taxi and returned with him to the police car where the officer verified that the vehicle was not stolen.

The officer then questioned defendant about matters unrelated to the speeding violation. During this conversation the officer testified that he "noticed in the (defendant's) vehicle the subject in the rear seat made some furtive movements which raised my suspicion." When asked what those "furtive movements" were, the officer explained "Well, the subject reached down a couple of times towards the floor of the vehicle." The officer asked defendant "if he was carrying any type of contraband, guns, drugs, anything of that nature" and defendant stated that he was not. The officer then asked defendant if he could "take a look" into the vehicle and defendant said "go ahead." The officer directed the passengers out of the car and frisked them and the defendat but found nothing.

The officer then searched the car. He went to the front seat and "took a look around in there" but found nothing. The officer returned to the rear seat which was "very loose." He then testified "I simply lifted it up and there in the rear seat was a brick-shaped form wrapped in paper. I picked that up, tore away the paper and I noticed a white powdery substance." The officer immediately arrested defendant and his companions for illegal drug possession

but did not issue defendant a speeding ticket until three hours later at police headquarters.

There is no question that the officer had the right to stop defendant for speeding and order him and the passengers out of the car (see, Pennsylvania v Mimms, 434 US 106; People v Robinson, 74 NY2d 773, cert denied __ US __ , 110 SCt 411; People v McLaurin, 70 NY2d 779, 781). The officer had no justification, however, for questioning defendant about matters unrelated to the speeding violation, or for searching the vehicle by looking underneath the seats (see, People v Class, 63 NY2d 491, 495, revd 475 US 106, reaffirmed on remand 67 NY2d 431). A police officer's entry into a citizen's vehicle and his inspection of personal effects therein are significant invasions of privacy and such intrusions must be justified in their inception and be reasonably related in scope and intensity to the circumstances which rendered their initiation permissible (see, People v Torres, 74 NY2d 224, 229-230; People v DeBour, 40 NY2d 210, 215). A speeding violation without more cannot sustain a search of defendant's vehicle (see, People v Adams, 32 NY2d 451, 454-455; People v Marsh, 20 NY2d 98, 101-103). Moreover, although under certain circumstances a police officer who has validly arrested an occupant of an automobile may contemporaneously search the passenger compartment including any containers found therein, this right is limited only to situations where the police "have reason to believe that the car may contain evidence related to the crime for which the occupant was arrested, or that a weapon may be discovered, or a means of escape thwarted" (emphasis added); (People v Belton, 55 NY2d 49, 55 rearg denied 56 NY2d 646; see also, People v Blasich, 73 NY2d 673, 678-679).

Here, defendant adequately responded to the officer's questions, produced his license upon request, and the officer ascertained that the vehicle was not stolen. Moreover, possession of contraband or a gun is not related to speeding, the traffic offense for which defendant was stopped. Thus, the only possible justification for searching the vehicle was the officer's observation of "furtive movements" by the rear seat passenger.

A passenger who bends down to the floor of a vehicle is not engaged in "furtive" movements. There is nothing presumptively

clandestine or sneaky about such activity and it is certainly susceptible of innocent interpretation (see, People v Santiago, 136 AD2d 942) particularly where, as here, the passenger was putting his shoes on when the officer returned to the car and ordered him out of it. The officer did not claim that the passenger's movements were sudden or posed an immediate threat to his safety. Rather the officer testified that his training alerts him to "different things...for example possible weapon, when I walk back up to the car, possibly getting shot, possibly maybe hiding something you know, I don't know. I don't know at that point what he's doing so my main goal at that point is to find out what he's doing." When the officer returned to the car he found out what the passenger was doing - simply putting on his shoes. The officer frisked the passenger and found nothing. At that point the officer clearly lacked probable cause to search the car (see, People v Elwell, 50 NY2d 231). The officer had no articulable or reasonable basis for conducting any further inquiry and should have issued defendant a speeding ticket and sent him on his way (see, People v Rose, 125 AD2d 727, 729, lv denied 69 NY2d 954).

County Court erred in finding that defendant voluntarily consented to the search. The court in its decision misstated that the police asked defendant "would he mind if I searched the vehicle?" (emphasis added). The officer, however, testified that he asked defendant "Do you mind if I take a look in your vehicle?" and he said, "No I don't mind, go ahead." The scope of a search must be limited strictly to the terms of the consent (see, Walter v United States, 447 US 649, 656-657; People v Jakubowski, 100 AD2d 112, 116-117). On this record defendant's permission to look in the car does not amount to consent to search the car by removing the rear seat.

Moreover, it is important to recall that searches conducted without a warrant and without prior approval of a detached and neutral magistrate are per se unreasonable (see, Coolidge v New Hampshire, 403 US 443, 454-455). It is for this reason that the People have a heavy burden to establish voluntary consent (see, People v Whitehurst, 25 NY2d 389, 391) and courts should indulge every reasonable presumption against waiver (Johnson v Zerbst,

304 US 458). "Voluntariness is incompatible with official coercion, actual or implicit, overt or subtle" (People v Gonzalez, 39 NY2d 122, 128). Submission to lawful authority is not voluntary consent (see, Bumper v North Carolina, 391 US 543, 550). Here, defendant's consent was not voluntary. Defendant was removed from his vehicle, separated from his companions and interrogated about subjects unrelated to the speeding violation for which he was stopped. Defendant was not advised of his right to refuse to consent and although such advice is not mandatory it is a factor to consider in determining whether defendant's consent was voluntary (see, People v Gonzalez, supra, at 130). Under these circumstances we conclude that defendant's legal and constitutional rights were violated.

Accordingly, the judgement must be reversed and defendant's motion to suppress granted and the indictment dismissed.

All concur , except Boomer and Pine, JJ., who dissent and vote to affirm in the following Opinion by Pine, J.: We respectfully dissent and vote to affirm. The only witness at the suppression hearing was the State Police officer who stopped defendant. The suppression court found that the officer asked defendant , "Would he mind if I took a look in the car," and that defendant responded, "No, go ahead." The court, applying the criteria of People v Gonzalez (39 NY2d 122), found that defendant understood the request, voluntarily and intelligently waived his right to refuse it, and consented to the search. It further found that defendant conversed with the officer and was cooperative, that the atmosphere did not appear strained, and that defendant was not in custody. The record supports those findings.

The majority finds that, on this record, consent to "look" in the car does not amount to consent to "search" it by removing the rear seat, and further finds that any consent was involuntary. No distinction between looking and searching was drawn at the hearing, however. While the officer initially testified on direct examination that he asked to look in the car, on cross-examination he was asked without objection, "After you asked Mr. Guzman if he would mind permitting you to search his vehicle, you testified that he had said that yes, that would be okay?" The officer responded, "That's right."

We find no basis in this record to reject the suppression court's finding that defendant voluntarily consented to the search of his car. (Appeal from Judgement of Cayuga County Court, Corning, J. - Criminal Possession Controlled Substance, 2nd Degree.) PRESENT: BOOMER, J.P., GREEN, PINE, LAWTON, DAVIS, JJ.

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

PEOPLE OF THE STATE OF NEW YORK,

Appellant.

-vs-

EDDY GUZMAN,

Respondent

I, Elizabeth W. Pine, Associate Justice of the Appellate Division, Fourth Judicial Department, do hereby certify that upon the application made by the appellant requesting permission to appeal to the Court of Appeals from an order of this court entered February 2, 1990, reversing a judgement of the Cayuga County Court entered in the Cayuga County Clerk's Office on June 2, 1989, there is a question of law presented which ought to be reviewed by the Court of Appeals, and permission to appeal is hereby granted.

Dated: March 22, 1990

____s_____
Associate Justice

*See, CPl 460.70(3) for methods for perfecting the appeal.

Court of Appeals
State of New York

The Hon. Sol Wachtler, Chief Judge, Presiding

4 No. 215 SSM 23

The People & c.,

Appellant,

-vs-

Eddy Guzman,

Respondent.

Ind. No. 3623-A

The appellant(s) in the above entitled appeal appeared by Hon. Paul A. Carbonaro, District Attorney, Cayuga County;the respondent(s) appeared by Andrew F. Phelan, Esq.

The court, after deliberation, orders and adjudges that no review of submissions pursuant to section 500.4 of the Rules, appeal dismissed upon the ground that the reversal by the appellate Division was not "on the law alone or upon the law and such facts which, but for the determination of law, would not have led to reversal" (CPL 450.90 [2] [a]).

The Court further orders that this record of the proceedings in this Court be remitted to the Cayuga County Court

there to be proceeded upon according to law:

I certify that the proceeding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

_____s_____

Stuart M. Cohen, Deputy Clerk of the Court

Court of Appeals, Clerk's Office, Albany, July 5, 1990

State of New York
Court of Appeals

Decision

July 5, 1990

CASES

4 No. 215 SSM 23

The People & c.,

Appellant.

-vs-

Eddy Guzman,

Respondent.

On the review or submissions pursuant to section 500.4 of the Rules, appeal dismissed upon the ground that the reversal by the Appellate Division was not "on the law alone or upon the law and such facts which, but for the determination of law, would not have led to reversal" (CPL 450.90 [2] [a]).

§ 500.4. Sua sponte examination of merits

(a) The court may examine the merits of selected appeals, on its own motion, by an expedited summary procedure.

(b) Appeals may be selected on the basis of: (1) nonreviewable or affirmed findings of fact; (2) clear recent controlling precedent; (3) narrow issues of law not of overriding or statewide importance; (4) nonpreserved issues of law; or (5) other appropriate categories. The legal issues to be resolved on such appeals to this court may be determined on the Appellate Division record and briefs, the writings in the courts below and such additional written submissions on the merits as counsel may file. In such cases, upon receipt and review of the section 500.2 jurisdictional statement, the clerk will notify all counsel by letter that the appeal has been selected for summary consideration.

(c) An appeal selected for summary consideration of the merits is nevertheless subject to dismissal on the court's own motion should it be determined that the court is without subject matter jurisdiction (see section 500.3 of this Part).

(d) Counsel may include in the 500.2 statement a request that the appeal be considered for summary resolution, along with a showing that that course is appropriate in counsel's view, and respondent's counsel may likewise request or controvert such requests in written form.

(e) Upon receipt of the clerk's letter initiating the summary consideration inquiry, appellant must file one copy of the Appellate Division record and one copy of each brief filed by any party in the Appellate Division. Original exhibits not in the record or appendix at the Appellate Division must be submitted to this court or, if they are on file with the clerk of the trial court, shall be subpoenaed to this court and the court so advised in the letter transmitting the record or appendix. They should be clearly identified and, where appropriate be certified or stipulated as to their authenticity.

(f) Appellant must serve and submit to the court, within 20 days of the clerk's inquiry, written comments and arguments in support of appellant's position on the merits. Respondent's submissions must be served and filed 15 days after receipt of appellant's submission. If either party objects to summary consideration, written comments and arguments justifying that position should accompany the written comments and arguments submitted in support of its position on the merits. The court either will direct that the appeal proceed in the normal course of full briefing and argument or will proceed directly to decide the merits summarily. Proof of the required service on appellant or respondent must be included with the papers filed with the clerk.

(g) If the summary consideration inquiry is terminated, the clerk will issue a normal course letter and give counsel a new time schedule for perfecting the appeal for full briefing and oral argument, if desired.

(h) Subject to the criteria of section 500.11 (Amicus curiae relief on formal motion for normal course appeals), amicus curiae relief on appeals selected for expedited summary procedure may be authorized on written submission to the court, served on all parties, requesting that right and including the proposed submission.
(Formerly § 500.2, sub (g), add, filed Nov 19, eff Jan 1, 1982; redesignated § 500.4 and amd, eff Jan 1, 1984.)